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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1174

Vitamin,
Appellant,

vs.

Cynthia J. Vermeulen, et al.,
Respondents.

Filed April 2, 2012
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CV-10-8517

Jerome S. Rice, Jerome S. Rice Law Office, Minneapolis, Minnesota; and

Steven V. Rose, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for appellant)

Kay Nord Hunt, Valerie Sims, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Randall, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

CONNOLLY, Judge

Appellant-client challenges the district court's grant of summary judgment to an attorney and her law firm (collectively, respondent) on a legal-malpractice claim. Respondent represented appellant in her marriage-dissolution proceedings; appellant argues that respondent's negligence resulted in the misidentification and division of marital property. Because we see no issue of material fact in dispute that would preclude summary judgment and the district court did not err as a matter of law, we affirm.

FACTS

Around 1973, Misha Gordin, then 27, and his first wife immigrated to the United States from Latvia. They settled in Michigan, where Gordin pursued his career as a self-employed artist. In 1985, his wife was killed in a car accident. In 1986, appellant Vitamin, then 24, a self-employed clothing designer, began living with Gordin in his Michigan condominium. Their first child was born in 1989.

In 1992, after selling the condominium, Gordin used the proceeds from the sale and from the $220,000 insurance settlement he received after his wife's death to purchase a piece of property in Stearns County, Minnesota, (the property) for $215,000. He and appellant began living in the house on the property, which they remodeled using Gordin's funds. In 1993, they married, and their second child was born.

In 1995, Gordin executed a handwritten quitclaim deed of the property to himself and appellant as tenants in common. In May 2003, Gordin and appellant executed a

quitclaim deed of the property to themselves, after which appellant obtained a $30,000 mortgage on the property for her business.

In January 2005, appellant and Gordin separated. Their assets then included the property, then worth $775,000; another piece of residential property, worth $145,000, to which appellant moved when they separated; and Gordin's unsold artwork, valued by him at $638,000 and by appellant's appraiser at $2,895,000.

Appellant retained respondent to represent her in the marriage dissolution. After a trial, the district court in its dissolution judgment awarded the property, unencumbered by the $30,000 mortgage, to Gordin as a nonmarital asset and the other residential property to appellant. Some of Gordin's artwork was awarded to him as a nonmarital asset; the remainder was divided between him and appellant as a marital asset.

Appellant was dissatisfied with the dissolution judgment and retained respondent to handle an appeal. In *Vitamin v. Gordin*, No. A08-1565 (Minn. App. Dec. 1, 2009), this court affirmed the judgment completely, rejecting appellant's arguments that she had a marital interest in Gordin's investment account, that she therefore had a marital interest in the property because funds from that account were used to improve the property, that the district court's findings of fact supporting the award of the property to Gordin were clearly erroneous, and that the in-kind division of Gordin's artwork was an abuse of the district court's discretion.

Appellant then brought this legal malpractice action against respondent, who counterclaimed for unpaid attorney fees and moved for summary judgment. Respondent was granted summary judgment with respect to appellant's claims. Appellant challenges

the grant of summary judgment, arguing that respondent was negligent in representing her, that the negligent representation was the cause of appellant's damage, and that appellant is entitled to have the matter remanded for trial under Minn. Stat. § 544.42, subd. 6(a) (2010).

DECISION

On an appeal from a summary judgment, this court reviews de novo whether there is a genuine issue of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

> To bring a successful claim of legal malpractice, a plaintiff traditionally must show four elements: (1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; [and] (4) that but for defendant's conduct, the plaintiff would have been successful in the prosecution or defense of the action. If the plaintiff does not provide sufficient evidence to meet all of these elements, the claim fails.

Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006) (quotation and citation omitted). The existence of an attorney-client relationship is not disputed here.

In granting summary judgment, the district court concluded that appellant had not met either the negligence or the causation criterion of a legal-malpractice claim. Specifically, the district court determined that appellant's expert affidavit, stating that it was "more likely than not" that the district court would have divided the property equally

between appellant and Gordin, if respondent had argued that the doctrine of gifting gave appellant a marital interest in the property, was "speculative."

I. Negligence

During trial, both appellant and Gordin were questioned on the quitclaim deeds.

> [GORDIN'S ATTORNEY]: Are you telling us that you believe that Mr. Gordin was making a gift to you of half of the property?
> [APPELLANT]: Does a husband gift his wife by putting her name on a title? No.
> [GORDIN'S ATTORNEY]: Did he ever tell you he was giving you half the property?
> [APPELLANT]: No, I don't ---.
> [GORDIN'S ATTORNEY]: Never said that to you?
> [APPELLANT]: I wouldn't know. I wouldn't remember. That would seem very strange.

Gordin testified that the first quitclaim deed was handwritten by him at the direction of appellant's father, an attorney, because Gordin wanted "to make sure that in case of [Gordin's] death . . . [his] family would be able to survive financially." Gordin said "yes" when asked if he considered the quitclaim deed "basically an estate plan." He testified that the purpose of the second quitclaim deed was "for [appellant] to get a loan." When asked, "[D]id you believe that you were transferring to [appellant] an interest in your property?" Gordin answered "[I]t would never occur to me because I just thought that I am co-signing for her to get a loan." Thus, neither appellant nor Gordin testified that the quitclaim deeds represented any intent to give appellant an interest in the property. In light of their testimony, the district court in the dissolution action concluded that the property was Gordin's nonmarital property. *See Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997) (holding, in the context of a third party's gift to a married couple,

"[t]he most important factor in determining whether a gift is marital or nonmarital is the donor's intent."); *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 696-97 (Minn. App. 2010) (noting that "tracing property to its nonmarital source does not require intricate detail"), *review denied* (Minn. Nov. 16, 2010).

Appellant relies on *Ouellette v. Subak*, 391 N.W.2d 810, 815-16 (Minn. 1986) (holding that a professional who fails to obtain the necessary information before exercising professional judgment commits malpractice) to argue that respondent was negligent because she "failed to follow [appellant's] direction and pursued [her] own trial strategy without ascertaining all relevant facts." But failure to follow a client's direction on legal strategy is not negligence. "To prove negligence in a legal-malpractice case, the plaintiff must establish the standard of care and show that the attorney, through negligent acts, breached the standard of care. Expert testimony is generally required to establish both the standard of care and breach." *Noske v. Friedberg*, 713 N.W.2d 866, 873-74 (Minn. App. 2006) (citation omitted).

Appellant's expert states that respondent did not argue that "the deed coupled with the intent of Gordin transformed the . . . property from non-marital property to marital property" because respondent "apparently did not understand that if the donor had the intent of making a gift at the time of the deed the property would be transformed from non-marital to marital." But, given that respondent had heard both appellant and Gordin testify that there was no donative intent and that the property was intended to provide for the family in the event of Gordin's death, it is not surprising that respondent would not have raised or pursued this argument.

II. Causation

To conclude that appellant had failed to meet the causation criterion of a prima facie malpractice case, the district court relied on *Schmitz v. Rinke, Noonan, Smoley, Dieter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 736, 747 (Minn. App. 2010) (affirming judgment as a matter of law granted to law firm and reversing denial of law firm's motion for summary judgment because the expert affiant's "opinions on the issue of causation were speculative, lacking in foundation and based on erroneous interpretation of Minnesota law"), *review denied* (Minn. Sept. 21, 2010).

> Expert affidavits must make far more than mere general disclosures. If the affidavits contain nothing more than broad and conclusory statements as to causation, they are legally insufficient to satisfy the professional-malpractice statute. Expert affidavits must provide more than a sneak preview of the plaintiff's case. The gist of expert opinion as to causation is that it explains to the jury the "how" and the "why" the malpractice caused the injury. Conclusory statements are insufficient to establish a prima facie case. When a question involves matters outside of ordinary lay knowledge, the expert must offer testimony based on an adequate factual foundation showing that the complained-of act caused the harm at issue, or else the jury would be left to impermissibly speculate as to causation.

Id. at 746-47 (quotations and citations omitted).

The district court found that here, the expert's opinion "is based on assumptions as to how the trial court would have proceeded. These assumptions are speculative." Language in the expert's affidavit supports this finding. The expert said that, if respondent had properly presented the facts to the district court, "*it is more likely than not* that the court would have found the . . . property to be marital property as a result of a

gift" and that *"[I]t is more likely than not* that but for this breach of the standard of care by [respondent] the trial court would have found the . . . property to be marital and would have divided the equity equally between [appellant] and Gordin . . . ." (Emphasis added.) This language does not meet the standard of explaining why and how respondent's alleged malpractice caused appellant's injury, nor would it prevent speculation as to causation. *See id.* This is particularly true in light of the fact that almost all decisions that the district court makes in a dissolution action fall within the abuse-of-discretion standard. *See Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002) (holding that district court has broad discretion in evaluating and dividing property in a marital dissolution and that its decision will not be overturned except for abuse of discretion); *Dorweiler v. Dorweiler*, 413 N.W.2d 572, 576 (Minn. App. 1987) (holding that, "if the division [of marital property] is equitable, there is no requirement that it be equal.").

The district court did not err in concluding that appellant's malpractice claim failed.

III. Impact of Minn. Stat. § 544.42, subd. 6(a) (2010)

Appellant also argues that the district court erred by not making specific findings as to the defects of the expert affidavit and granting her 60 days in which to correct those defects, claiming that this procedure is required by Minn. Stat. § 544.42, subd. 6(a).

A plaintiff claiming professional malpractice must serve with the pleadings an affidavit of expert review. *Id.*, subd. 2 (1) (2010). This affidavit must be drafted by the plaintiff's attorney and state that the attorney has reviewed the case with an expert "whose qualifications provide a reasonable expectation that the expert's opinions could

be admissible at trial" and who believes the defendant deviated from the applicable standard of care and thereby injured the plaintiff. *Id.*, subd. 3 (a), (1) (2010). "Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(a). The statute says nothing about making findings or about giving 60 days to cure a deficiency in an affidavit of expert review.

Appellant nevertheless argues that the district court had an obligation to make "the detailed findings required by Minn. Stat. 544.42" and that she was "entitled to the 60 day safe harbor to cure those deficiencies under the 'safe harbor' provision of Minn. Stat. § 544.42." She relies on *Noske* for these arguments. In *Noske*, after a federal district court determined that an attorney had provided ineffective assistance to a client in a criminal case, the client brought a legal malpractice action in state district court. 713 N.W.2d at 870.

> [The attorney] moved to dismiss on the ground that [the client's] affidavit of expert review . . . was inadequate [because the affiant was not experienced in criminal law]. . . . [The client] opposed the motion, and in response to the alleged deficiencies, submitted the affidavit of . . . an experienced criminal-defense attorney. The district court denied the [attorney's] motion to dismiss and allowed [the client] to submit the substitute affidavit of expert review.

Id. This court held that "the district court did not abuse its discretion by determining that [the client's] first affidavit of expert review was deficient. Nor did the district court err

by permitting appellant to submit a substitute affidavit to correct the deficiency. . . ." *Id.* at 877.

Noske is distinguishable procedurally. Unlike the attorney in *Noske*, respondent did not move to dismiss on the ground that appellant's affidavit of expert review was deficient. Thus, the district court would have had no reason to admit an amended affidavit of review or an affidavit from another expert.

Affirmed.